STATE OF MICHIGAN

COURT OF APPEALS

GEORGIA HOLMES, Personal Representative of the Estate of JESSIE HOLMES, Deceased,

Plaintiff,

v

EDWARD BAUER and LJ BEAL & SONS, INC.,

Defendants-Appellees,

and

COMMUNITY AMBULANCE SERVICE and MICHAEL MACKIE,

Defendants-Appellants,

and

PAUL COLEMAN,

Defendant.

UNPUBLISHED
May 15, 2003

No. 235573
Wayne Circuit Court
LC No. 98-833930-NI

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendants Michael Mackie and Community Emergency Medical Services[1] appeal as of right a jury's finding that they were negligent and sixty-one percent at fault for plaintiff's decedent Jessie Holmes' death. The jury also found defendants Edward Bauer and L.J. Beal & Sons, Inc. negligent and allocated to them thirty-nine percent of the fault for Holmes' death. We affirm.

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[1] "Mackie" refers to defendants-appellants Michael Mackie and Community Ambulance Service (Mackie's employer), and "Bauer" refers to defendants-appellees Edward Bauer (the truck driver) and L.J. Beal & Sons, Inc. (owner of the truck and Bauer's employer).

At approximately 5:00 a.m. on September 10, 1998, a semi-truck driven by Bauer crashed into the rear of an ambulance engaged in a non-emergency transport. Mackie was driving the CEMS ambulance, and Coleman, an emergency medical technician, was attending Holmes. Mackie and Bauer agreed to pay plaintiff a sum certain of $500,000. Trial in this matter was conducted for the sole purpose of allocating fault between Mackie and Bauer for the collision that caused Holmes' death.

Mackie first argues the trial court erred in ruling that the immunity granted by the Emergency Medical Service Act (EMSA), MCL 333.20965(1), constituted an affirmative defense that Mackie waived by failing to assert it in a responsive pleading.[2] Whether a defense is an affirmative defense is a question of law reviewed de novo. *Citizens Insurance Co v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001).

The EMSA protects emergency medical service workers from liability under certain circumstances:

> Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a[n] . . . emergency medical technician . . . while providing services to a patient outside a hospital . . . that are consistent with the individual's licensure or additional training required by the medical control authority . . . do not impose liability in the treatment of a patient on those individuals . . . . [MCL 333.20965(1).]

Preliminarily, we note that MCR 2.111(F)(3)(a) expressly identifies immunity granted by law as an affirmative defense that must be pled in a responsive pleading in order to be preserved. Nonetheless, not all immunity constitutes an affirmative defense that must be asserted in a responsive pleading to be preserved. In *Mack v City of Detroit*, 467 Mich 186, 197-205; 649 NW2d 47 (2002), our Supreme Court held that governmental immunity is not an affirmative defense that may be waived. "Sovereign immunity exists in Michigan because the state created the courts and so is not subject to them." *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002). From the time of Michigan's statehood, Michigan courts have recognized that the state, as sovereign, is immune from suit unless the state consents to being sued. The Supreme Court concluded that "governmental immunity is a characteristic of government" and any party bringing suit against the state is obligated to plead facts in avoidance of governmental immunity. *Mack, supra.*

Mackie is asking this Court to impose upon all parties who bring suit against an emergency medical service provider the obligation to plead facts in avoidance of the EMSA and to conclude that immunity under the EMSA may not be waived as a matter of law. We decline to reach such a conclusion. Unlike sovereign immunity, immunity granted under the EMSA is not an inherent characteristic of emergency medical services. Rather, immunity granted by the EMSA constitutes immunity granted by law as that term is used in MCR 2.111(F)(3)(a). Accordingly, immunity granted under the EMSA constitutes an affirmative defense that is waived if not asserted in a responsive pleading. Mackie failed to assert this defense in the first

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[2] The defense was first raised in Mackie's trial brief seven days before trial.

responsive pleading and, therefore, the trial court properly denied Mackie the opportunity to defend on this basis. MCR 2.111(F)(2); *Citizens*, *supra* at 241.

Mackie next contends the trial court abused its discretion when it excluded from evidence the Commercial Driver's License Manual (CDLM). We disagree. This Court reviews a trial court's ruling to admit or exclude evidence for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998). A trial court abuses its discretion when an impartial person, considering the facts on which the trial court based its decision, would conclude there was no justification or excuse for the court's ruling. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999).

Here, Mackie apparently wished to introduce the entire CDLM as representing "all rules that individuals must abide by to become a licensed truck driver." The primary argument for the manual's admission rested on Mackie's inaccurate characterization of the manual's relationship to the federal regulation mandating the manual's creation and distribution. Mackie claims that the CDLM is the equivalent of law because the applicable federal regulation "essentially adopts the CDL manual by reference." The relevant language of the federal statute reads:

> Information on how to obtain a CDL and endorsements shall be included in manuals and made available by States to CDL applicants. All information provided to the applicant shall include the following:
>
> (1) Information on the requirements described in § 383.71, the implied consent to alcohol testing described in § 383.72, the procedures and penalties, contained in § 383.51(b) to which a CDL holder is exposed for refusal to comply with such alcohol testing, State procedures described in § 383.73, and other appropriate driver information contained in subpart E of this part;
>
> (2) Information on vehicle groups and endorsements as specified in subpart F of this part;
>
> (3) The substance of the knowledge and skills which drivers shall have as outlined in subpart G of this part for the different vehicle groups and endorsements;
>
> (4) Details of testing procedures, including the purpose of the tests, how to respond, any time limits for taking the test, and any other special procedures determined by the State of issuance; and
>
> (5) Directions for taking the tests. [49 CFR 383.131(a).]

Mackie relies on the above federal regulation (mandating the *publication* of a manual for individuals wishing to obtain a commercial driver's license) as the federal government's adopting into law the *content* of CDL manuals compiled in all fifty states. Although Michigan's Vehicle Code does clearly require a person who wishes to obtain a CDL to "pass knowledge and driving skills tests that comply with minimum federal standards prescribed in 49 C.F.R. part

383," the vehicle code does not indicate that the CDLM's content contains enforceable rules or regulations, the violation of which constitutes evidence of negligence. MCL 257.312f(1).

The Legislature has expressly incorporated into Michigan law sections of the Code of Federal Regulations pertaining to motor carrier safety regulations. MCL 474.131; *Shirilla v City of Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995). No similar incorporation of federal regulations appears in the statutory provisions regarding commercial motor vehicles. Statutes that relate to the same class of persons and share a common purpose should be read in pari materia, *Shirilla*, *supra* at 441, and the Legislature is presumed to know the consequences of its use or omission of statutory language. *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998). The Legislature's express adoption of federal regulations pertaining to motorbus transportation and its omission of a similar statute pertaining to commercial motor vehicles is fatal to Mackie's contention that the trial court abused its discretion by declining to admit in evidence the CDL manual.

We further observe that the trial court's ruling did not preclude Mackie from utilizing the CDL manual for purposes of impeachment. Thus, Mackie was free to reference the content of the manual and inquire about specific manual guidelines while cross examining Bauer.

Mackie next claims the trial court abused its discretion by denying Mackie's motion for mistrial. We disagree. This Court reviews a trial court's ruling on a party's motion for mistrial for an abuse of discretion. *In re Flury Estate*, 249 Mich App 222, 228; 641 NW2d 863 (2002). A mistrial is warranted only when the prejudice resulting from an error threatens the fundamental purposes of accuracy and fairness. *In re Flury*, *supra* at 229.

The trial court denied Mackie's motion and properly noted that a witness' bias or motive is a relevant basis for questioning and that the disputed testimony had not breached the boundaries of propriety. Notwithstanding the propriety of the testimony, the court in a curative instruction cured any unfair prejudice. The jury was expressly informed that no arrest warrant was ever issued against Mackie, and the court directed the jury not to draw any unfair inferences from the fact that Mackie at one time believed he might be arrested. Jurors are presumed to follow their instructions. *Craig v Oakwood Hosp*, 249 Mich App 534, 561; 587 NW2d 498 (2002).

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra